INTERACTIVE MEDIA ENTERTAINMENT AND GAMING ASSOCIATION, INC. v. ATTORNEY ... THE UNITED STATES Doc. 16 Att. 5

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October 4, 2007

HON. JAMES P. MURPHY, JR.
Chief Deputy, United States District Court
Clarkson S. Fisher Federal Building and U.S. Courthouse
402 East State Street
Trenton, NJ 08608

RE: Interactive Media Entertainment & Gaming Ass'n v. Gonzales, *et al.*
Docket No. CV-072625-07
Our File No. 1967-001

Dear Chief Deputy Murphy:

Please accept this letter brief in lieu of a formal brief in regard to the above matter.

The Proposed Joint Rulemaking Should Be Reviewed by the Court Since No Opinion Has Been Rendered But the Issue of Rulemaking Was Addressed by the Parties.

The Federal Rules of Civil Procedure and the Local Rules of Civil Procedure for the District of New Jersey do not specify a way to supplement the record as new evidence becomes available after oral argument. However, the Federal Rules of Appellate Procedure, *F.R.A.P.* 28(j), permit a party to promptly notify the court when "pertinent and significant authorities come to a party's attention . . . after oral argument but before decision. . . ." Plaintiff asks the court to apply this standard and consider the Proposed Joint Rulemaking. Certification of Counsel, **Exhibit 1**.

F.R.A.P. 28(j) permits a party to cite arguments which are affected by the new authority. First, the proposed rules undercut Defendants' ripeness arguments. Plaintiff's

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Response and Reply Brief of September 10, 2007 (hereinafter referred to as "**Prb**") at page 22-23.

Second, Plaintiff argued that the Act constitutes impermissible infringement on Constitutional rights. **See, e.g., Prb-24 through 26**. The Rules continue this dangerous trend, and the promulgating agencies concede that there has been a chilling effect which threatens iMEGA's members and affiliates.

> Some payment system operators have indicated that, for business reasons, they have decided to avoid processing any gambling transactions, even if lawful, because, among other things, they believe that these transactions are not sufficiently profitable to warrant the higher risk they believe these transactions pose.

Exhibit 1, Part II(D) at 19.

The Analysis specifically states that "the Agencies' preliminary view is that issues regarding the scope of gambling-related terms should be resolved by reference to the underlying substantive State and Federal gambling laws and not by a general regulatory definition." **Exhibit 1,** Part II(A) at 6. The Agencies admit that "the Act does not comprehensively or clearly define which activities are lawful and which are lawful." ***Id.*** at 25. As argued, the Act and Rules are unconstitutional because the legislative scheme requires the identification and facilitating of legal "unrestricted" transactions while preventing "restricted" illegal transactions.

Thank you for your attention to this matter.

Very truly yours,
Eric M. Bernstein & Associates, L.L.C.

By: ______________________
Philip G. George, Esquire

PGG/pgg (347 words in body of letter. *F.R.A.P.* 28(j))

CC: Jacqueline Coleman Snead, Esquire, A.U.S.A.
Hon. Mary L. Cooper, U.S.D.J.
Hon. Tonieanne J. Bongiovanni, U.S.M.J.
iMEGA, L.L.C.